



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8



IN THE MATTER OF:)
)
T&K CUSTOMS) Docket No. SDWA-8-2000-14
) Proceedings Under Section
KATHY D. CASPER and) 1423(c) of the Safe Drinking Water Act,
T-K CONSTRUCTION) 42 U.S.C. 300h-2(c)
TODD J. CASPER)
LAKE PRESTON, SOUTH DAKOTA)
Respondents)
_____)

INITIAL DECISION

By: Alfred C. Smith
Presiding Officer

Issued: August 14, 2002
Denver, Colorado

Appearances

For Complainant:
James Eppers Esq., Enforcement Attorney
Legal Enforcement Program
U. S. EPA, Region 8
Denver, Colorado

For Respondent:
Todd J. Casper - Pro se

This is an action by the United States Environmental Protection Agency, Region 8 ("USEPA", "EPA", "the Agency", or "complainant") against Kathy D. Casper d/b/a T&K Customs, and Todd J. Casper d/b/a T-K Construction ("Kathy Casper", "Todd Casper", "T&K Customs", "T-K Construction", "respondent(s)") under Section 1423(c) of the Safe drinking Water Act (SDWA", or "the Act"), 42 U.S.C. § 300h-2(c), for violations of the Act and regulations promulgated pursuant thereto.

I. BACKGROUND AND PROCEDURAL HISTORY

On May 23, 2000, the EPA issued a Proposed Administrative Order with Administrative Civil Penalty ("PAO", or "complaint") against the respondents, under the above authority, for

violations of the SDWA and the Underground Injection Control (“UIC”) regulations promulgated pursuant thereto, under sections 1421 and 1422 of the SDWA, 42 U.S.C. §§ 300h and 300h-1. Specifically, the respondents are alleged to have violated 40 C.F.R. § 144.12(a) for failing to close or retrofit a Class V well, and 40 C.F.R. § 144.25(a) for failing to submit a completed UIC permit application, along with the required analysis of the fluid waste from the drains to EPA, as required by the regulations.

On June 12, 2000, the respondents, acting *pro se*, filed a timely Answer and Request for a Hearing, pursuant to section 22.15 of the Consolidated Rules of Practice, 40 C.F.R. § 22.15. On June 14, 2000, the South Dakota Department of Environment and Natural Resources (“DENR”) filed comments on the subject action, under the public comment provisions of the Act. Subsequently this tribunal participated in several telephone conferences to resolve this matter. On April 5, 2001, this tribunal conducted a final pre-hearing telephone conference in this matter. On Tuesday, May 8, 2001, at 9:00 A.M., this tribunal convened a hearing pursuant to Subpart D of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.22 - 22.26. The hearing was held in the Stanley County Court House 08 East 2nd Avenue, Ft. Pierre SD 57532. After the hearing, the complainant filed its proposed findings of fact, conclusions of law, a proposed order and briefs in support thereof. The respondents filed a written response.

The entire administrative record of this proceeding including, but not limited to, the pleadings, the transcript of the hearing, all proposed findings, conclusions, and supporting arguments of the parties have been considered in formulating this Initial Decision. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant, or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

For the reasons set forth below, T-K Construction is dismissed as a respondent in this matter. The respondents Kathy D. Casper, as owner of T&K Customs, and Todd J. Casper, as operator of T&K Customs, are liable for violating the SDWA and EPA’s UIC regulations. After considering the factors set forth in Section 1423(c)(4)(B) of the Act, 42 U.S.C. §300h-2(c)(4)(B), a penalty of **One-thousand, five-hundred dollars (\$1,500.00)** is assessed against the respondents, and respondents are **ORDERED** forthwith to comply with the Act and the regulations promulgated pursuant thereto. Their failure to do so may subject them to additional penalties.

II. STATUTE AND REGULATIONS

Pursuant to the Safe Drinking Water Act, 42 U.S.C. § 300f et seq, the Administrator is authorized to establish underground injection control (“UIC”) programs and promulgate regulations to prevent underground injection of fluids which may endanger drinking water sources. See sections 1421 and 1422 of the Act, 42 U.S.C. §§ 300h and 300h-1.

Section 1421 (d) of the Act, 42 U.S.C. § 300h(d) specifically provides that:

“(1) The term “underground injection” means the subsurface emplacement of fluids by well injection”

“(2) Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system’s not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.”

Pursuant to the UIC program, established in accordance with §§ 1421 and 1422 of the Act, 42 U.S.C. §§ 300h and 300h-1, the Agency promulgated regulations in 40 C.F.R. §§ 124, 144, 146, 147, and 148, to prevent underground injection which endangers drinking water sources.

EPA’s underground injection program establishes five classes of underground injection wells (Class I, II, III, IV and V). See 40 C.F.R. § 144.6. Injection wells not included in Class I, II, III, or IV, fall into Class V. Typically, Class V wells are shallow wells used to place a variety of fluids directly below the land surface. Class V wells include, but are not limited to, septic systems used to inject wastes underground. See 40 C.F.R. § 144.81(9). Motor vehicle waste disposal wells that receive or have received fluids from vehicular repair or maintenance activities, or any facility that does any vehicular repair work are also Class V wells.¹

The underground injection of fluids from Class V wells which may cause a violation of any primary drinking water regulation under 40 C.F.R. part 142 is prohibited. See 40 C.F.R. § 144.12(a).

The EPA may require the owner/operator of any Class V well to submit to EPA a completed UIC Permit Application along with the required analysis of the fluid wastes from the drains. See 40 C.F.R. § 144.25(a).

In the instant case, the respondents allegedly own and/or operate a UIC, Class V, motor vehicle waste disposal well that receives fluids from vehicular repair, or maintenance activities. The injection of these wastes underground, above a USDW, may cause a violation of primary drinking water regulations and, as such, is prohibited.

¹ Fluids disposed in these wells may contain organic and inorganic chemicals in concentrations that exceed the maximum contaminant levels (MCLs) established by the primary drinking water regulations (see 40 C.F.R. part 142). These fluids also may include waste petroleum products and may contain contaminants, such as heavy metals and volatile organic compounds, which pose risks to human health. See 40 C.F.R. § 144.81(16).

Respondents are allegedly in violation of 40 C.F.R. § 144.12(a) for failure to close or retrofit the Class V disposal system in a manner that would keep contaminants from entering a USDW, which could cause a violation of a primary drinking water regulation and could otherwise adversely affect the health of persons.

The respondents are also allegedly in violation of 40 C.F.R. § 144.25(a) for failing to submit to EPA a completed UIC permit application along with the required analysis of the fluid wastes from the drains as required by EPA.

These proceedings are governed by the “*Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of Permits*,” 40 C.F.R. Part 2, Fed. Reg./Vol. 64, No 141/July 23, 1999 (“Consolidated Rules of Practice”, “Consolidated Rules”, or “the Rules”).

III. ISSUES

1. Who are the proper respondents in this matter;
2. Is the facility operated by T-K Customs a Class V injection well;
3. Did respondents violate 40 C.F.R. § 144.12(a) by failing to close or retrofit their Class V disposal system in a manner that would keep contaminants from entering a USDW;
4. Did respondents violate 40 C.F.R. § 144.25(a) by failing to submit to EPA a completed UIC permit application along with the required analysis of the fluid waste from the drains in the required time period; and
5. If any of the respondents are found liable, what civil penalty should be assessed against them?

IV. DISCUSSION

Proper Respondents.

The original caption of the PAO in the instant case identified four respondents:

T&K CUSTOMS
KATHY D. CASPER and
T-K CONSTRUCTION
TODD J. CASPER

The caption clearly associates Kathy Casper with T&K Customs (d/b/a T&K Customs), and Todd Casper with T-K Construction (d/b/a T-K Construction). Further, there is no

indication in the PAO that Kathy Casper is in any way associated with T-K Construction, nor that Todd Casper is in any way associated with T&K Customs.

The complainant cast a wide net to capture every possible respondent in this action. This resulted in excessive entanglement of the named respondents. Pleading practice of this type should be avoided, as it unduly complicates the task of the Presiding Officer. It is now necessary to untangle the facts of this case to determine who are the proper respondents in this matter.

T&K Customs and T-K Construction are both operated from the same facility located at 20956 441st Avenue, Lake Preston, South Dakota. A single building houses the offices of both businesses, and the maintenance and service operations of T&K Customs. T&K Customs maintains and services snowmobiles. Although T-K Construction has its offices at this address, and parks its vehicles (trucks etc.) on the premises, its vehicles are serviced elsewhere.

The Class V well, that is the subject of this action, is a septic system that allegedly receives wastes from the facility in which T&K Customs maintains and services snowmobiles. Since, T-K Construction's vehicles are not maintained or serviced in this facility, T-K Construction does not contribute to the waste discharges to the septic system. Therefore T-K Construction does not come within the scope of EPA's UIC regulations. This tribunal questioned the inclusion of T-K Construction as a respondent, early on in these proceedings. In fact, the complainant was ordered to Show Cause why T-K Construction should not be dismissed as a respondent.² Notwithstanding, the complainant continued to press for the retention of T-K Construction, as a respondent, based on unsubstantiated allegations, as late as March 23, 2001³. This matter went to hearing on May 5, 2001. It was not until July 20, 2001, that the complainant moved to dismiss T-K Construction, as a respondent in this matter. I find that the complainant lacked subject matter jurisdiction over T-K Construction. A respondent can be dismissed at any stage of a proceeding for lack of subject matter jurisdiction.⁴ My Order of August 13, 2001, which dismissed T-K Construction as a respondent in this action, is hereby affirmed.

When one part of the PAO is found to be defective, the remainder is not affected; however, the complainant can no longer rely on the defective parts of the complaint. In the instant case, as set forth above, I find that the inclusion of T-K Construction in this action was in error. Therefore, the complainant cannot rely on any information or allegations pertaining to T-K Construction in its case against T&K Customs. This includes relying on any financial

² See March 5, 2001, Summary of 2nd Telephone Conference and Order.

³ See complainant's Show Cause Statement and Motion to Amend Proposed Administrative Order filed March 23, 2001.

⁴ Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. See F.R.C.P. (h)(3). Although the F.R.C.P. do not apply to these proceedings, they are useful as guidance.

information associated with the owner of T-K Construction, Todd Casper, in the penalty phase of this matter.

On the other hand, T&K Customs is in the business of maintaining and servicing snowmobiles inside the facility. The facility has multiple floor drains. Snowmobiles are motor vehicles within the meaning of 40 C.F.R. § 144.81(16). Fluids from the maintenance of these motor vehicles may enter the facility's waste disposal system through any of the several floor drains. The waste disposal system is a septic tank and leach field located immediately in the back of the facility. The septic tank is a Class V well as defined by 40 C.F.R. § 144.81(9). The leach field injects wastes from the septic tank (well) into the subsurface. The leach field overlies a USDW, the Howard Aquifer. The movement of fluids into the USDW may endanger the Aquifer. T&K Customs is therefore operating a Class V well.

T&K Customs is a sole proprietorship. A sole proprietorship has no separate existence apart from the owner. T&K Customs is owned by Kathy Casper. A more descriptive caption in the PAO might be - Kathy Casper d/b/a T&K Customs. Kathy Casper signed the Shallow Injection Well Inventory Request Form returned to EPA, on or about December 30, 1998, as the owner of T&K Customs.⁵ Kathy Casper is, by her own admission, the owner of T&K Customs and therefore is a proper respondent in this matter.

The PAO does not allege that Todd Casper is the operator of T&K Customs; however, Todd Casper has waived any defense of lack of jurisdiction over the person, by his own actions and admissions and by failing to raise it as a defense.⁶ Further, on March 23, 2001 the complainant moved to add Todd Casper as a respondent-operator of T&K Customs, based on his own admissions that he was, in fact, the operator of T&K Customs.⁷ An examination of the record reveals that Todd Casper is materially involved with the operations of T&K Customs. It was Mr. Casper that showed EPA inspectors, Mr. Minter and Mr. Urband, around T&K Customs during their May 5, 1999, inspection of the facility. At that time he admitted to Mr. Minter that he was the operator of T&K Customs. Ms. Christensen testified (Tr. p. 141) that she knew from her numerous conversations with Todd Casper that he was the operator of T&K Customs. Notwithstanding the discrepancies in the PAO, I find that Todd Casper is, in fact, the operator of T&K Customs. As such Todd Casper is a proper respondent in this matter. The complainant's motion of March 23, 2001, to include Todd Casper in this action, as an operator of T&K Customs is hereby **granted**.

⁵ See Complainant's Ex. # 4.

⁶ Although the F.R.C.P. do not apply to this administrative proceeding, they are useful as guidance. Under the Rules, a defense of lack of jurisdiction over the person is waived if it is omitted from a motion. F.R.C.P. 12(h)(1). The respondent also waived this defense by his own admissions.

⁷ See complainant's March 23, 2001, Show Cause Statement and Motion to Amend Proposed Administrative Order.

T&K Customs - A Class V Well.

A “Well” is defined as a subsurface fluid distribution system.⁸ The process of “Well Injection” is defined as the subsurface emplacement of fluids through a well.⁹ The movement of fluids containing any contaminant into underground sources of drinking water (“USDWs”) is prohibited, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR part 142, or may otherwise adversely affect the health of persons.¹⁰ Injection wells not included in Class I, II, III, or IV are Class V wells.¹¹

The respondents are charged with operating a Class V injection well. See 40 C.F.R. § 144.6(e). More specifically, 40 CFR § 144.81 defines Class V wells as:

“(9) Septic system wells used to inject the wastes or effluent from a . . . , business establishment”

“(16) Motor vehicle waste disposal wells that receive, or have received fluids from vehicular repair or maintenance activities, such as an auto body repair shop, automotive repair shop, . . . or any facility that does any vehicular repair work. Fluids disposed in these wells may contain organic and inorganic chemicals in concentrations that exceed the maximum contaminant levels (“MCLs”) established by the primary drinking water regulations (see 40 C.F.R. part 142). These fluids also may include waste petroleum products and may contain contaminants, such as heavy metals and volatile organic compounds, which pose risks to human health.”

On May 5, 1999, EPA inspectors Douglas Minter and Howard Urband, accompanied by Mr. Casper, inspected a building located at 20956 441st Avenue, Lake, Preston, SD 57249, that contains the offices of T&K Customs and T-K Construction, and the operations of T&K Customs (“the facility”). Their inspection revealed that the building is divided into three different rooms (Tr. p.38). Mr. Minter testified that he observed a floor drain in the middle room. A partially disassembled snowmobile was parked next to the drain (Tr. p. 38).¹² Mr. Minter observed a second floor drain in the room South of the middle room. Another room, North of the center room, contained metal panels that had apparently been recently spray painted. Mr. Casper told Mr. Minter that the drains in the building were connected to each other and that they ultimately connected to a septic tank, with a leach field, in the back of the building

⁸ See 40 CFR § 144.3

⁹ See 40 CFR § 144.3

¹⁰ See 40 CFR § 144.12(a)

¹¹ See 40 CFR § 144.6

¹² Snowmobiles are motor vehicles within the meaning of 40 CFR § 144.81(16)

(Tr. p 39). Based on Mr. Minter's observations, and Mr. Casper's admissions, it is apparent that the respondents, d/b/a T&K Customs, own/operate a business that has a Class V motor vehicle waste disposal well.

Wastes from the repair and maintenance of snowmobiles may be discharged onto the floor and collected by floor drains, which constitute the facility's waste collection system. The drains also collect the facility's sanitary wastes. The wastes thereby collected are discharged into a septic tank, located immediately in back of the facility. The septic tank system is a Class V waste disposal well within the meaning of 40 CFR § 144.81(9) and (16). The septic system disposes of the waste fluids underground via a leach field, which overlies a USDW, the Howard Aquifer.¹³ The movement of these wastes, which may contain contaminants, into a USDW is prohibited. Based on the above, T&K Customs' septic system is a Class V well, which must be permitted or closed.

Violation of 40 C.F.R. 144.12(a) and 40 C.F.R. § 144.25(a)

On or about October 29, 1998, EPA mailed a Class V Injection Well Inventory Information Request letter to T&K Customs via certified mail return receipt requested. Based on the information provided by the respondents on the Inventory Request Form, EPA determined that the respondents own/operate a disposal system which EPA designates as a Class V injection well, used for motor vehicle waste disposal.¹⁴ This was confirmed by an inspection of the facility, by Mr. Minter and Mr. Urband on May 5, 1999.

As authorized by 40 C.F.R. § 144.12(c) and (d), on or about April 23, 1999, EPA mailed a UIC Shallow Injection Program Letter to respondents via certified mail, return receipt requested. Pursuant to the letter, respondents were required to either discontinue the use of their motor vehicle waste disposal system, or apply for a UIC permit prior to September 15, 1999.¹⁵

On or about November 16, 1999, EPA representatives performed an enforcement inspection of the respondents' facility. The EPA inspectors found that the Class V motor vehicle waste disposal well system was still in operation.¹⁶

On or about February 16, 2000, EPA mailed a UIC Notice of Noncompliance Letter to the Respondents, certified mail, return receipt requested. Respondents were informed that they were in violation of 40 C.F.R. § 144.12(c) for: (1) failure to close or retrofit the Class V disposal

¹³ See 40 CFR § 144.12(a)

¹⁴ See ¶¶ 8 and 9 of the May 23, 2000, PAO.

¹⁵ See ¶ 11 of the May 23, 2000, PAO.

¹⁶ See ¶ 13 of the May 23, 2000, PAO.

system in a manner that would keep contaminants from entering a USDW¹⁷; and (2) for failure to submit to EPA a completed UIC permit application along with the required analysis of the fluid waste from the drains¹⁸, in the required time period, as required by the letter dated April 23, 1999.¹⁹

Pursuant to the February 16, 2000, letter respondents were required to 1) contact the EPA, in writing, within fifteen days of the receipt of the letter detailing their plans for closing the Class V disposal system; 2) close the system within thirty (30) days of the receipt of the letter; and 3) provide EPA with subsequent documentation of the closure. To date, respondents have not submitted the required plans for closing or retrofitting the system, nor have they submitted a permit application for the disposal system.

Respondents are currently operating an injection well in a manner that may allow the movements of fluids containing contaminants into a USDW. The presence of the contaminant(s) could cause a violation of a primary drinking water regulation and could other wise adversely affect the health of persons.

To date, respondents have failed to close or retrofit the Class V disposal system in a manner that would keep contaminants from entering a USDW, as required by EPA's letter dated February 16, 2000. The duration of respondents' violations for failure to close the Class V disposal system is from September 15, 1999, to present. I find that the respondents are in violation of 40 C.F.R. § 144.12(a) for failure to close or retrofit the Class V disposal system in a manner that would keep contaminants from entering a USDW.²⁰

To date, respondents have failed to submit a completed UIC permit application along with the required analysis of the fluid waste from the drains, to EPA as requested by the February 16, 2000, letter. The duration of the violations is from September 15, 1999 to present. I find that the respondents are in violation of 40 C.F.R. § 144.25(a) for failing to submit to EPA a completed UIC permit application along with the required analysis of the fluid waste from their system in the required time period.²¹

V. ANALYSIS OF CIVIL PENALTY CRITERIA

Administrative penalties for violations of Section 1401 et seq of the Act, 42 U.S.C. §§ 300f et seq, are determined in accordance with Section 1423(c)(4)(B) of the Act, 42 U.S.C. §

¹⁷ See 40 C.F.R. § 144.12(a)

¹⁸ See 40 C.F.R. § 144.25(a)

¹⁹ See ¶ 14 of the May 23, 2000 PAO.

²⁰ This violation only pertains to T&K Customs.

²¹ This violation only pertains to T&K Customs.

300h-2(c)(4)(B).

Section 1423(c)(2) of the SDWA, 42 U.S.C. § 300h-2(c)(2), provides that:

“ in any case in which the Administrator is authorized to bring a civil action under this section with respect to any regulation or other requirement of this part . . . the Administrator may also issue an order under this subsection either assessing a civil penalty of not more than \$10,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of \$125,000, or requiring compliance with such regulation or other requirement, or both.”²²

Section 1423(c)(4)(B) of the Act, 42 U.S.C. § 300h-2(c)(4)(B) provides that:

“in assessing any penalty . . . , the Administrator shall take into account . . . (i) the seriousness of the violation; (ii) the economic impact (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.”

40 C.F.R. § 22.27(b) of the Consolidated Rules of Practice provides:

“If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence and in accordance with any penalty criteria set forth in the Act. The Presiding officer shall consider any civil penalty guidelines issued under the Act.” It further provides that “ . . . if the Presiding Officer decides to assess a penalty different in amount from the penalty proposed in the complaint, the Presiding Officer shall set forth in the Initial Decision the specific reasons for the increase or decrease.”²³

The Consolidated Rules of Practice require that the Presiding Officer consider any civil penalty guidelines issued under the applicable Act. The EPA has not promulgated any civil penalty guidelines specific to the Safe Drinking Water Act. Notwithstanding, the enforcement staff is generally guided in the assessment of civil penalties by two documents: (1) Policy on

²²This has been increased to \$11,000 for each day of violation, up to a maximum of \$137,500. This change took effect for any violation which occurred after January 30, 1997. 40 C.F.R. Part 19.

²³ Consolidated Rule 22.27(b) also directs that the Presiding Officer consider, in addition to the factors enumerated in the statute, any civil penalty guidelines issued under the statute. The Agency has not issued any civil penalty guidelines for assessment of penalties for violation of the SDWA. Accordingly, the statutory penalty factors alone will guide assessment of a penalty in this case.

Civil Penalties (“the Penalty Policy”), and (2) A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on Civil Penalties (the “Penalty Framework”), both dated February 16, 1984.²⁴

In the instant case, the complainant based its penalty calculations on the “Interim Final UIC Program Judicial and Administrative Order Penalty Policy” dated September 27, 1993 (UIC Settlement Policy).²⁵

Below, the “nature, circumstances, extent and gravity” of the violation will be considered initially to determine the “seriousness of the violation”. The remaining statutory factors: the economic benefit resulting from the violation; any history of such violations; any good-faith efforts to comply; the economic impact on the violator; and such other matters as justice may require will be considered as “adjustment factors”, with respect to the penalty amount. The overall approach, consistent with the Agency’s Penalty Policy Framework, will be to derive a base penalty amount, based on the seriousness of the violation, which may then be modified based on the adjustment factors.

Complainant argues that the facts of this case warrant the imposition of the statutory maximum penalty for a single day of violation - \$11,600. Respondent maintains that no penalty is appropriate in this case, and asserts its inability to pay any penalty that is assessed. As set forth below, after considering the entire administrative record and applying the statutory penalty factors to this case, the respondents are assessed a **One-thousand, five-hundred dollar (\$1,500.00) penalty** for their violations, and ordered to **immediately comply** with the Act and the UIC regulations promulgated pursuant thereto.

A. The Seriousness of the Violation

The complainant’s witnesses presented extensive testimony as to what contaminants **could** be present in T&K Custom’s waste discharges. In his testimony, Mr. Wireman referred to paint as a contaminant. There is evidence that T&K Customs spray painted snowmobile parts in its facility, but **no evidence** was presented that any paint entered the drains. In fact, from the photos it appeared that there may have been dried paint on the floor - nothing more. Mr. Wireman also talked about gasoline contamination. But there was **no evidence** that gasoline entered any of the respondent’s drains. He also mentioned antifreeze, but here again, there is **no evidence** of antifreeze in the respondent’s drains or septic system. Brake fluid was also mentioned, but again there is **no evidence** that brake fluid entered the drains or septic system.

²⁴ Respectively, GM 21 and 22

²⁵ This is apparently based on EPAs’ Penalty Policy documents: (1) Policy on Civil Penalties (“the Penalty Policy”), and (2) A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on Civil Penalties (the “Penalty Framework”), both dated February 16, 1984. See testimony of Ms. Christiansen , Tr., starting p. 134.

Mr. Wireman also testified extensively on the harm that **Dense Non Aqueous Phase Liquids (DNAPLs)** posed to a USDW. Here again, the presence of these wastes is nothing more than speculation. In fact, since EPA failed to take **any samples**, there is **no evidence of any** of the aforementioned **contaminants**, or contaminants of any kind, **in the waste discharges from the subject facility**.

In determining the seriousness of the violation, I considered the possible harm from the respondent's violations of the SDWA and the UIC regulations promulgated pursuant thereto. Actual harm is not required. I was unable to evaluate the possible harm, since the complainant took **no samples** from the facility's waste collection or disposal systems. As noted above, In its case in chief, the complainant presented an abundance of evidence as to what pollutants might be present. No samples were taken to show the presence of **any** contaminant in the facility's waste discharges. There must be some evidence of the presence of at least one contaminant, at some point in the system, in order to find, **even**, a potential for contamination. **The presence of contaminants cannot be presumed**, especially where the complainant is aggressively seeking a substantial civil penalty. All of the complainant's evidence, with respect to the presence of contaminants is purely speculative. Due process, as a minimum, requires more than mere speculation by the complainant, as to what contaminants may be present (if this were not the case, the complainant could allege anything, without proof). Further, the complainant has the burden of proving the violation. It is concluded that the weight given to the seriousness of the violation, cannot be maximized based on complainant's speculation that contaminants are present, especially when **the complainant had an opportunity to take samples, to establish the presence of contaminants, and failed to do so**.

In its defense, the respondent argues that it runs a closed system and that no contaminants from the servicing and maintenance of the snowmobiles enters the drains. Mr. Minter testified that the facility was a relatively clean facility, **but that it was not closed**.²⁶ Respondent alleges that all spills are recovered using absorbents, or wiped up, so no contaminants enter the facility's waste disposal system. Notwithstanding, respondent admits that the drains in these service areas have not been sealed, and are connected to the septic system - **the system is not closed**. Official notice is taken that snowmobiles are motor vehicles, and servicing of these motor vehicles requires the removal and replacement of antifreeze, oil, gasoline and other such contaminants. If any of these contaminants should enter the waste disposal system of T&K Customs, their discharge underground above a USDW, would endanger the USDW.

Further, which respect to endangerment, the respondent presented testimony from Sheldon Hamann, a hydrologist for the South Dakota Department of Environment and Natural Resources. Mr. Hamann testified as to the rate that contaminants would infiltrate the USDW, the Howard Aquifer. Mr Hamann believes it would take millions of years for any contaminate to percolate down to the USDW, and that the potential for endangerment is almost non existent. In

²⁶ A closed facility is one in which the wastes it generates are contained therein and properly disposed of off-site.

rebuttal, the complainant presented testimony by Mr. Wireman who believes although it may take tens of thousand years for contaminants to reach the USDW through normal channels, alternate pathways present a more immediate danger to the USDW.

Based on the above, and because the complainant failed to establish the presence of **any contaminant** in T&K Custom's waste discharges, I find that T&K Customs' violations are not serious. Due process requires that the complainant present some evidence to support its allegations, not just speculate as to the present of contaminant(s) in the discharges of the subject facility.

This tribunal takes official notice that motor vehicle waste disposal wells may contain organic or inorganic chemicals in concentrations that may exceed the (MCLs) established by primary drinking water standards and other contaminants that might pose a risk to human health, if they should enter a USDW. It is found that T&K Customs is operating a Class V motor vehicle waste disposal well in violation of the SDWA and UIC regulations promulgated pursuant thereto. Further, the respondents have failed to close the motor vehicle waste disposal well, as required by the SDWA and the UIC regulations. The respondents are assessed a **Five-hundred dollar (\$500.00) penalty**, for the **seriousness of the violation**. This base penalty is adjusted, as follows:

B. The Economic Benefit (if any) Resulting from the Violation

In determining the economic benefit, Ms. Christiansen based her calculations on the cost that were avoided by not properly disposing of the waste water generated by the facility (Tr.p146). She assumed that the facility's wastes would fill a 2000 gallon tank 3 times a year. She estimated that using a local septic service would cost \$200 to empty the tank and properly dispose of the wastes. If this were done three times a year, the cost would be \$600. She therefore estimated that the respondent received an economic benefit of \$600 by not complying with EPA's UIC regulations.

EPA policy states that a violator should not benefit from non-compliance. It is Agency policy that penalties should, at a minimum, remove any significant economic benefits for failing to comply with the law.²⁷ Based on Ms. Christiansen's calculations, to remove any economic benefit that the respondents achieved for failing to comply with the SDWA and the Agency's UIC regulations promulgated pursuant thereto, **the penalty assessed, in "A" above, is increased by Six-hundred dollars (\$600.00).**

C. Any History of Such Violation

Ms. Christiansen testified that she was unaware of any previous violations by the respondent. So she did not adjust the proposed civil penalty, either up or down (Tr. p 48)

²⁷ See GM 21 and 22,

The assessed penalty is not adjusted, up or down, for this factor.

D. Any Good Faith Efforts to Comply with the Applicable Requirements.

Ms. Christiansen testified that the respondent did not make a good faith effort to comply with applicable requirements. She stated that based on information available to her the well was still open, at the time of the hearing. The respondent failed to submit a written plan, or put forth a good faith effort to come into compliance with the requirements. Other examples of the respondent's lack of good faith, include, but are not limited to, submitting the inventory form a month late, repeatedly failing to meet oral commitments to come into compliance etc.²⁸

In responses to the Presiding Officer, Mr. Casper repeatedly questioned EPA's authority and its UIC regulations. For example in a December 21, 2001 letter to the Presiding Officer he relied on communications from the South Dakota DENR in alleging that the Class V well program is not justified. Mr. Casper appears to have set himself above the law in determining what would be acceptable (based on his studies and research) to bring T&K Customs into compliance with the SDWA and EPA's UIC regulations. If everyone subject to EPA's regulations were to do the same, the result would be total chaos. This tribunal cannot condone such actions by the respondent.

Therefore, I find that the respondent, Todd J Casper, has not made a good faith effort to comply with the SDWA and EPA's UIC regulations. For respondents' **lack of a good-faith** in complying with the applicable requirements, **the penalty assessed, in "A" above, is increased by Four-hundred dollars (\$400.00).**

E. The Economic Impact of the Penalty on the Violator.²⁹

The complainant argues that the assets of T-K Construction and Todd Casper are fair game for a financial analysis to determine the respondents' ability to pay the proposed civil penalty. As ruled above, the complainant cannot use any information pertaining to T-K Construction, to prove its case, because of the unwarranted inclusion and retention of T-K Construction, as a respondent, in this matter.

²⁸ See testimony of Ms. Christiansen, Fr. Pp 149 - 51.

²⁹ In a June 6, 2001, Post-hearing Order "The Respondent [was] reminded that it has failed to present any evidence, for the record, regarding its ability or inability to pay a penalty. Since, this Court can only base its decision on the evidence that is in the administrative record, *it is critical that the respondent enter financial information on its ability to pay a penalty into the record, in its post-hearing submissions, to avoid any adverse inference being drawn from its inaction* (emphasis ours).

With respect to Kathy Casper, the complainant argues that the schedule Cs submitted by the respondent are inadequate to determine if the respondent has the ability to pay the proposed penalty. The complainant further argues that Mrs. Casper's income from her employment (as a postal worker) should be at risk for the payment of a civil penalty. In support thereof, it cites several authorities that hold a sole proprietor personally liable for the debts of the business. I find this a specious argument, since the complainant has no information as to how much Mrs. Casper makes. I therefore find that the complainant's arguments with respect to Mrs. Casper's income are not credible.

The respondents submitted the schedule Cs of their Federal Tax Returns for the 1997, 98 and 99 tax years. Schedule C's show the profit/loss from a business. Any analysis of these forms is difficult, since the respondents filed joint returns, for the subject years, and the schedule Cs constitute only a portion of their returns. The region's financial analyst, Daniela Golden attempted to determine the respondent's ability to pay, based on the scant information available to her.³⁰

The complainant noted in its September 12, 2001 Brief "In Support of its Motion to Exclude or in the Alternative Find that Respondents have Not Met their Burden of Showing Inability to Pay the Proposed Penalty", that the respondents have repeatedly failed to comply with the numerous requests, by the complainant, for information to determine their ability to pay. Further, the Presiding Officer, in a June 6, 2001, Post-hearing Order, strongly reminded the respondents that they have failed to present any evidence, for the record, regarding their ability or inability to pay a penalty. The Order stated that "Since, this Court can only base its decision on the evidence that is in the administrative record, ***it is critical that the respondent enter financial information on its ability to pay a penalty into the record, in its post-hearing submissions, to avoid any adverse inference being drawn from its inaction*** (emphasis ours)". The respondent subsequently submitted copies of the schedules Cs of its Federal Tax Returns for the years 1997, 1998 and 1999. As noted above, the complainant found, and I so find, these portions of their Federal tax returns are inadequate to determine the respondents ability to pay.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of mitigating circumstances, rests with the respondent.³¹ See the Environmental Appeals Board's opinion in In re: New Waterbury, Ltd. 5 E.A.D. 529 (1994). I therefore find that the respondents have not demonstrated an inability to pay a penalty of **\$1,500.00**.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

³⁰ See September 12, 2001, Memorandum from Daniela Golden to Jim Eppers, Subject: Preliminary Ability to Pay Analysis of Todd J. Casper, Kathy D. Casper and T&K Customs.

³¹ See GM-22, "A Framework for Statute-Specific Approaches to Penalty Assessments, February, 1984.

1. Pursuant to section 1422 of the Act, 42 U.S.C. § 300h-1, and Title 40, Code of Federal Regulations (40 C.F.R.) Part 147 Subpart QQ Section 147.2101, EPA administers the UIC program for Class I, III, IV, and V wells in the State of South Dakota. Pursuant to 40 C.F.R. § 147.2101(b), the effective date of the program is December 30, 1984. Said UIC program consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147, and 148.
2. T&K Customs is a sole proprietorship, owned by Kathy D. Casper, and is authorized to do business in the State of South Dakota. Kathy D. Casper d/b/a T&K Customs is a “person within the meaning of section 1401(12) of the Act, 42 U.S.C. § 300f(12), and a respondent in this action;
3. T-K Construction, is a sole proprietorship, owned by Todd J. Casper, and is authorized to do business in the State of South Dakota. Todd J. Casper d/b/a T-K Construction is a “person” within the meaning of section 1401(12) of the Act, 42 U.S.C. § 300f(12);
4. Todd J. Casper is, in fact and by his own admissions, the operator of T&K Customs. In that capacity he is a respondent in this action and a “person within the meaning of section 1401(12) of the Act, 42 U.S.C. § 300f(12).
5. The offices of both T&K Customs and T-K Construction are housed in a building (“the facility”) located at 20956 441st Avenue, Lake, Preston, SD 57249.
6. T&K Customs is in the business of maintaining, servicing, and repairing snowmobiles. Snowmobiles are motor vehicles within the meaning of 40 C.F.R. § 144.81(16).
7. Any wastes from T&K Customs’ operations are collected by floor drains inside the facility. The wastes collected by the floor drains are combined with sanitary wastes, prior to being discharged to a septic system for treatment, and disposal.
8. The septic tank’s leach field overlies an underground source of drinking water (“USDW”), the Howard Aquifer. The leach field injects T&K Customs’ wastes, which may contain contaminants, underground. These wastes may percolate through the soil and enter a USDW, the Howard Aquifer. The contaminants contained in these wastes may endanger public health, if they enter the Howard Aquifer.
9. Septic Tanks, dry wells, cesspools, and any other type of disposal system which allows fluids to move into USDWs are considered shallow injection wells. Respondents’ disposal system, as described above, is classified as a “Class V Injection Well”, as defined by 40 C.F.R. §§ 144.6 and 146.5.

10. The facility's septic system is a Class V well that must either be permitted or closed, in accordance with EPA's UIC regulations, respectively 40 C.F.R. 144.25(a), or 144.12(a).
11. The vehicles of T-K Construction are not serviced, in the subject facility. Wastes from the maintenance and servicing of T-K Construction's vehicles cannot therefore enter the septic system - the Class V well.
12. Because wastes from the maintenance and servicing of T-K Construction vehicles are not disposed of in the Class V well, the complainant lacks subject matter jurisdiction over T-K Construction. Therefore, T-K Construction is dismissed as a respondent in this action, and any information pertaining to T-K Construction is inadmissible in this action.
13. On or about October 29, 1998, EPA mailed a Class V Injection Well Inventory Information Request letter to T&K Customs via certified mail. This letter was delivered and received, by T&K Customs, on or about November 5, 1998.
14. The information provided by respondents in the Inventory Request Form, received by EPA December 30, 1998, indicated that the respondents operate a disposal system which EPA designates as a Class V injection well, used for motor vehicle waste disposal.
15. As authorized by 40 C.F.R. § 144.12(c) and (d), on or about April 23, 1999, EPA mailed a UIC Shallow Injection Program Letter to respondents via certified mail. The letter was delivered and received by respondents on or about May 6, 1999. Pursuant to the letter, respondents were required to either discontinue the use of respondents' motor vehicle waste disposal system, or apply for a UIC permit prior to September 15, 1999.
16. On or about May 5, 1999 an EPA representative performed a routine inspection of respondents' facility to verify the existence of a Class V disposal system. The EPA inspector identified, on the site, a UIC Class V type fluid disposal system, as described in the Inventory Request Form.
17. On or about November 16, 1999, EPA representatives performed an enforcement inspection of the respondent's facility. The EPA inspectors found the Class V Motor vehicle waste disposal well system was still in operation - not closed.
18. As authorized by 40 C.F.R. § 144.12(c) and (d), on or about February 16, 2000, EPA mailed a UIC Notice of Noncompliance Letter to the respondents, via certified mail. The letter was delivered and received on or about February 19, 2000. Respondents were informed that they were in violation of 40 C.F.R. 144.12(c) for failing to comply with the requirements of the letter of April 23,

1999. Pursuant to the Notice of Non compliance Letter, respondents were required to 1) contact the EPA, in writing, within fifteen (15) days of receipt of the letter detailing their plans for closing the Class V disposal system; 2) close the system within thirty (30) days of receipt of the letter; and (3) provide EPA with subsequent documentation of the closure.

19. To date, respondents have not submitted the required plans for closing or retrofitting the system, nor have they applied for a permit for the disposal system. As required by EPA's, February 16, 2000 UIC Notice of Non-compliance letter.
20. Respondents are in violation of 40 C.F.R. § 144.12(a) for failure to close or retrofit the Class V disposal system, in a manner that would keep contaminants from entering a USDW. Respondents are currently operating an injection well in a manner that allows the movement of fluids that may contain contaminants into a USDW. The presence of contaminant(s) could cause a violation of a primary drinking water regulation and could otherwise adversely affect the health of persons. The duration of respondents' violations for failure to close the Class V motor vehicle waste disposal system is from September 15, 1999 to present.
21. Respondents are also in violation of 40 C.F.R. § 144.25(a) for failure to submit to EPA a completed UIC permit application along with the required analysis of the fluid waste from the drains in the required time period. The duration of the violations is from September 15, 1999 to present.
22. By failing to apply for a permit pursuant to 40 C.F. R. § 144.25(a), in a timely manner, respondents have waived their right to a permit. They must now close their Class V motor vehicle waste disposal well, in accordance with EPA's UIC regulations.
23. A civil penalty was assessed by taking into account the statutory factors set forth in Section 1423(c)(4)(B) of the Act, 42 U.S.C. § 300h-2(c)(4)(B).
24. The complainant has the burden of proof of establishing the presence of contaminants in T&K Customs' waste discharges. Due process, at a minimum, requires more than mere speculation by the complainant that specific contaminants are present in the facility's discharges. The complainant had the opportunity, but **failed to take any samples** of the facility's discharges. As a result, there is no evidence that **any** contaminants were present in the facility's discharges. The failure of the complainant to meet its burden of proof of establishing the presence of contaminants in T&K Customs discharges goes to the weight given to the seriousness of the violations.
25. Based on the findings in ¶24 above, this tribunal finds that the violations are not serious. Notwithstanding the seriousness of the violations, the respondents own

and operate a Class V motor vehicle waste disposal well which may discharge contaminants that could endanger a USDW. Further the respondents have failed to close this well, as required by the SDWA and EPA's UIC regulations. The respondents are therefore **assessed a \$500.00 penalty, for the gravity (seriousness) of the violation**, pursuant to Section 1423(c)(4)(B) of the Act.

26. The respondents have saved \$600.00 by not properly disposing of wastes from their Class V well. For the **economic benefit** gained from their failure to comply with the SDWA and the UIC regulations, pursuant to Section 1423(c)(4)(B) of the Act, **the penalty assessed the respondents in ¶ 25 above is increased by \$600.00.**
27. Since the respondent has no history of violations, the penalty is not increased, or decreased for this factor.
28. The respondent, Todd J. Casper, has consistently demonstrated a lack of good faith in complying with the applicable requirements. He has taken issue with EPA's regulations throughout these proceedings. An examination of the Record reveals that the respondents have not closed their Class V motor vehicle waste disposal well, and may still not be in compliance the SDWA and EPA's UIC regulations. EPA's task of enforcing its regulations would be extremely difficult if every business, subject to the Act and the UIC regulations, adopted the same attitude as Mr. Casper. For the their **lack of good-faith**, in complying with the Act and EPA's UIC regulations, pursuant to Section 1423(c)(4)(B) of the Act, **the penalty assessed the respondents in ¶ 25 above is increased by \$400.00.**
29. The respondents failed to meet their burden to submit sufficient information to determine their ability, or inability to pay the assessed penalty. The respondents are assumed to have the ability to pay the assessed penalty. Therefore, no adjustment is made for the **economic impact of the penalty** on the respondent.
30. Pursuant to section 1423(c)(4)(B) of the Act, 42 U.S.C. § 300h-2(c)(4)(B), the respondents are assessed **a total civil penalty of One-thousand, five-hundred dollars (\$1,500.00)**, for their violations of the SDWA and EPA's UIC regulations.

VII. ORDER

Pursuant to the authority granted to the Presiding Officer it is hereby **ORDERED** that:

1. Within thirty (30) days of the effective date of this Order respondents shall comply with the requirements of 40 C.F.R. § 144.12(a) and the requirements of the February 16, 2000 noncompliance letter. Respondents shall submit plans in writing for the closure of their Class V disposal system, including a schedule for plugging the drains, or retrofitting the disposal system and submitting a plan for

alternative disposal for their wastes. If the respondent fails to comply with the above, it may be subject to additional penalties including criminal sanctions for knowingly failing to comply with the law.

2. The respondents, Kathy D. Casper d/b/a T&K Customs and Todd J. Casper, as the operator of T-K Customs, are assessed a civil penalty in the amount of **One-thousand, five-hundred dollars (\$1500.00)** for their violations of the Act and regulations promulgated pursuant thereto.
3. Payment of the full amount of the assessed civil penalty shall be made, within thirty (30) days of the service date of the final order, by submitting a certified check or cashier's check pay to the Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
EPA -Region 8
P.O. Box 360859
Pittsburgh, PA 15251

Copies of the check must be sent to both the Regional Hearing Clerk and to Mr. James Eppers, Enforcement Attorney, at:

U.S. EPA, Region VIII (ENF-L)
999 18th Street, Suite #300
Denver, Colorado 80202-2466

Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handing a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 102.13(e).

4. A transmittal letter identifying the subject case and the EPA docket number, plus the respondent's name and address, shall accompany the check.
5. Pursuant to 40 C.F.R. § 22.27 of the Consolidated Rules, the Initial Decision shall become a Final Order within forty-five (45) days after its service upon the parties and without further proceedings unless:
 - (a) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a);
 - (b) a party appeals this Initial Decision to the Environmental Appeals Board

(EAB);³² or

(c) The EAB elects, upon its own motion, to review the Initial Decision.

Where a respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

SO ORDERED This 14th Day of August, 2002.

/S/

**Alfred C. Smith
Presiding Officer**

³² Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the EAB. The procedures for filing an appeal are found in 40 C.F.R. § 22.30.